COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP363 **Cir. Ct. No. 2007CV1263**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

HENKE-CLARSON FUNERAL SERVICE, LLC D/B/A HENKE-CLARSON FUNERAL HOME, CASSANDRA M. CLARSON AND ROGER J. HENKE,

PLAINTIFFS-RESPONDENTS,

V.

CELIA M. JACKSON, STATE OF WISCONSIN DEPARTMENT OF REGULATION AND LICENSING, WILLIE E. GARRETTE, STATE OF WISCONSIN FUNERAL DIRECTORS EXAMINING BOARD, J. C. FRAZIER, MICHELE M. MOORE, ROSALIE A. MURPHY, DAVID E. OLSEN AND CONNIE C. RYAN,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 DYKMAN, P.J. The State of Wisconsin Department of Regulation and Licensing, the State of Wisconsin Funeral Directors Examining Board and individuals within both organizations[1] (collectively "the board") appeal from a circuit court decision denying its motion for summary judgment[2] and granting summary judgment to Cassandra Clarson, Roger Henke and Henke-Clarson Funeral Home (collectively Henke and Clarson). The board argues that it is entitled to summary judgment, because all the defendants are entitled to both qualified and absolute immunity. It also argues that, on the facts of this case, Henke and Clarson are not entitled to declaratory or injunctive relief regarding the constitutionality of the board's administrative rules regulating funeral directors.

¶2 Henke and Clarson argue that they are entitled to partial summary judgment as to the fact that the board violated their rights under the First Amendment to the United States Constitution, and a trial to establish their damages under 42 U.S.C. § 1983;[3] that the board is not entitled to either qualified or absolute immunity; and that the administrative rules regulating funeral directors are unconstitutional both facially and as applied in this case, entitling them to both

[1] The individual appellants are Celia Jackson, Willie Garrette, J.C. Frazier, Michelle Moore, Rosalie Murphy, David Olsen and Connie Ryan.

[2] We granted the board leave to file an interlocutory appeal by order dated March 6, 2009.

[3] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

declaratory and injunctive relief. We conclude, first, that the board is entitled to summary judgment on the 42 U.S.C. § 1983 claim. We then conclude that the parties' arguments on appeal are insufficient to establish whether Henke and Clarson are entitled to declaratory and injunctive relief.[4] Accordingly, we reverse and remand with directions for the circuit court to enter partial summary judgment in favor of the board.

BACKGROUND

¶3 The following facts are taken from the summary judgment materials. Cassandra Clarson and Roger Henke own the Henke-Clarson Funeral Home. Clarson is a licensed funeral director. Henke does not have a funeral director's license, and serves as Henke-Clarson's business manager.

¶4 In October 2005, the Wisconsin Department of Regulation and Licensing, Division of Enforcement, issued a complaint against Henke, Clarson and the Henke-Clarson Funeral Home for violating WIS. ADMIN CODE § FD 2.03(1) (March 2010),[5] which prohibits anyone other than licensed funeral directors from making "funeral arrangements."[6] WISCONSIN ADMIN. CODE § FD 2.02(1) defines "funeral arrangements" as "the provision of information or advice

[4] The parties discuss only the First Amendment rights of Cassandra Clarson and Roger Henke, and we limit our discussion to their First Amendment rights.

[5] All references to the WISCONSIN ADMINISTRATIVE CODE are to the March 2010 version unless otherwise noted.

[6] The board's complaint against Henke and Clarson was the result of an investigation initiated by a letter the board received from "Virginia Nickerman," complaining about the actions of Henke and Clarson. Sometime in the course of the investigation, it was established that the letter was actually written by Dale Holzhuter, a former business partner of Henke and Clarson, and Holzhuter's wife, and that all of the information in the letter was fabricated.

on selection and cost of merchandise, facilities, equipment or personal services provided for final disposition of a dead human body in the course of formulating a contractual agreement between a funeral director or funeral home and client." The complaint alleged that Henke violated WIS. ADMIN CODE § FD 2.03(1) by "gathering obituary information, meeting with pastors, setting the time of the funeral services and going over the monies to be advanced for the families; including the terms of the contract on the goods and services statement." The complaint alleged that Clarson and Henke-Clarson Funeral Home violated WIS. ADMIN CODE §§ FD 2.03(1) and 3.02(2)(9) by aiding and abetting Henke in those activities.

¶5 The disciplinary action was heard before an administrative law judge (ALJ) in July 2006. In January 2007, the ALJ issued a recommendation to the board with proposed findings of fact and conclusions of law. The ALJ recommended the board find that Henke and Clarson had violated the administrative rules because Henke was engaged in making "funeral arrangements" by discussing with customers "the types of pre-need funeral services they wanted, including where the funeral services would be held and if they were going to buy a casket or be cremated"; "advis[ing] [customers] in regard to the options for the funeral service[s] and the costs of the options"; "obtaining obituary information and preparing obituaries," "contacting clergy to set the times and locations for funerals," and "discussing the costs of funeral services and the monies to be advanced." The ALJ found that the evidence did not support the board's request for a one-year suspension of Clarson's funeral director's license, but found instead that an "an administrative injunction would be appropriate."

¶6 The board issued its final decision and order on August 7, 2007. It adopted the factual findings of the ALJ but rejected her disciplinary

recommendation, and instead ordered Clarson's license suspended for one year, beginning sixty days from the date of the order. It also ordered that Henke-Clarson submit a business plan within thirty days detailing how unlicensed employees would be limited from engaging in prohibited activities.

¶7 Henke and Clarson filed this action against the board on August 10, 2007, seeking damages under 42 U.S.C. § 1983 for violation of their rights under the First Amendment to the United States Constitution and a review of the administrative decision of the board under WIS. STAT. § 227.52 (2007-08).[7] The parties then stipulated to reverse and dismiss the board's administrative decision, with costs and attorney fees to Henke and Clarson of $68,000. Henke and Clarson moved for partial summary judgment "[d]eclaring that [the board] … violated [their] First Amendment rights, and are therefore liable to [Henke and Clarson] under 42 U.S.C. § 1983"; "[d]eclaring that Wis. Admin. Code §§ FD 2.03(1) and 2.02(1) are unconstitutional"; and an injunction preventing the board "from enforcing Wis. Admin. Code §§ FD 2.03(1) and 2.02(1) and any other purported regulation that would prevent an individual working under the supervision of a funeral director from transmitting truthful information to consumers concerning funeral-related products and services, from communicating with clergy, or from preparing obituaries." The board also moved for summary judgment on the 42 U.S.C. § 1983 claim. The circuit court denied the board's motion for summary judgment and granted partial summary judgment to Henke and Clarson, declaring WIS. ADMIN. CODE §§ 2.02(1) and 2.03(1) unconstitutional, and stating that the board had attempted to violate Henke and Clarson's First Amendment rights. The

[7] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

court withheld judgment on the request for injunctive relief. We granted the board's petition for leave to appeal.

STANDARD OF REVIEW

¶8 We review a circuit court order granting or denying summary judgment de novo, applying the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). "A party is entitled to summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶34, 309 Wis. 2d 365, 749 N.W.2d 211.

¶9 Ordinarily, "[a] decision to grant or deny declaratory relief falls within the discretion of the circuit court." ***Id.***, ¶35 (citation omitted). Here, however, the circuit court granted declaratory relief to Henke and Clarson in the context of a summary judgment order, and the court's decision turned on the constitutionality of the statute, which is a question of law. *See* ***State v. McManus***, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989). On these facts, we review the court's grant of declaratory relief de novo. *See* ***Olson***, 309 Wis. 2d 365, ¶¶32-33.

¶10 Whether to grant permanent injunctive relief is left to the trial court's discretion. ***Nettesheim v. S.G. New Age Prods., Inc.***, 2005 WI App 169, ¶9, 285 Wis. 2d 663, 702 N.W.2d 449.

DISCUSSION

Damages under 42 U.S.C. § 1983

¶11 The board argues that all of the defendants are entitled to either absolute or qualified immunity from the 42 U.S.C. § 1983 claim for damages

under the First Amendment to the United States Constitution. *See, e.g.*, ***Butz v. Economou***, 438 U.S. 478 (1978) (explaining absolute immunity for quasi-judicial acts of agencies); ***Barnhill v. Board of Regents***, 166 Wis. 2d 395, 479 N.W.2d 917 (1992) (public officials entitled to qualified immunity from plaintiff's claim for First Amendment violations under 42 U.S.C. § 1983). As part of their immunity argument, the board contends that Henke and Clarson have claimed only that the board *attempted* to violate Henke and Clarson's First Amendment rights, and thus have not established that the board violated any right clearly established by law. *See* ***Barnhill***, 166 Wis. 2d at 406 ("[Q]ualified immunity protects government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (citation omitted)). Apart from its immunity arguments, the board contends that an attempt to violate First Amendment rights is not actionable under 42 U.S.C. § 1983 because an attempt to violate First Amendment rights does not result in actual constitutional injury. *See* ***Andree v. Ashland County***, 818 F.2d 1306, 1311 (7th Cir. 1987) ("[A]n actual denial of a civil right is necessary before a cause of action arises [under 42 U.S.C. § 1983]." (citation omitted).)

¶12 Henke and Clarson respond that we should first address whether the board violated their First Amendment rights, rather than the board's immunity arguments.[8] Henke and Clarson argue that the board's actions in creating,

[8] Henke and Clarson frame the issues as: (1) whether the board violated their constitutional rights; (2) whether Henke and Clarson may sue for violation of their rights if the board's actions were unconstitutional but did not result in a fine or suspension of their business activities; (3) whether the board is entitled to qualified immunity; (4) whether the board is entitled to absolute immunity; and (5) whether Henke and Clarson are entitled to injunctive and declaratory relief. We address their first two stated issues together, and, because we conclude that Henke and Clarson have not established a claim for damages under 42 U.S.C. § 1983, "we (continued)

interpreting, and enforcing WIS. STAT. ADMIN. CODE §§ FD 2.02(1) and 2.03(1) violated their rights to commercial and private speech under the First Amendment to the United States Constitution. Henke and Clarson contend that the board's actions were an attempt to restrain their commercial and private speech, putting the burden on the board to establish the restraint was constitutional. *See* ***Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,*** 447 U.S. 557 (1980). They argue that their First Amendment rights were actually violated through the board's filing an administrative complaint and in communicating its allegations to their customers in the form of questionnaires during the course of its investigation. We begin with an analysis of the constitutional claim.

¶13 The first step in our summary judgment methodology requires us to review the pleadings to determine whether a claim has been stated.[9] *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751. We accept all facts alleged in the complaint and all reasonable inferences from those facts to determine whether the plaintiff has stated a claim, and we liberally construe the complaint. ***Bank One, NA v. Ofojebe***, 2005 WI App 151, ¶7, 284 Wis. 2d 510, 702 N.W.2d 456. Henke and Clarson assert that they are entitled to a trial to establish their damages based on the board's violating their

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need not concern ourselves with the vagaries of civil rights immunity." *See* ***Andree v. Ashland County***, 818 Wis. 2d 1306, 1310 n.6 (7th Cir. 1987) (citation omitted). We then address the issues of declaratory and injunctive relief.

[9] Henke and Clarson opposed the board's motion for summary judgment, and moved for partial summary judgment as to their claim that the board violated their First Amendment rights and asserted their right to a trial to prove their damages based on the board's actions. The trial court granted summary judgment to Henke and Clarson as to their claim that their First Amendment rights were violated by actions of the board. On appeal, Henke and Clarson continue to assert their right to a trial on the issue of damages, presumably based on material factual disputes, although they do not frame their argument in this way.

First Amendment rights. Henke and Clarson set forth the following facts in their complaint relating to their rights to free speech under the First Amendment and the board's actions:

> 17. … [The Board] has created an administrative rule, a portion of the Sate of Wisconsin Administrative Code, Section FD 2.03, as follows:
>
> > **Operation of a Funeral Establishment.** Even though persons other than licensed funeral directors may own a funeral establishment:
> >
> > (1) Funeral arrangements may be made only by licensed funeral directors; and
> >
> > (2) Any other dealings on behalf of the establishment, including the conducting of funeral services, shall be performed only by or under the supervision of licensed funeral directors.
>
> 18. … [The board] has created a second administrative rule, a portion of the State of Wisconsin Administrative Code, Section FD 2.02, as follows:
>
> > **Definitions.** As used in this Chapter:
> >
> > (1) "Funeral arrangements" means the provision of information or advice on selection and cost of merchandise, facilities, equipment or personal services provided for final disposition of a dead human body in the course of formulating a contractual agreement between a funeral director or funeral home and client.
> >
> > (2) "Funeral services" means the ceremonies held in conjunction with disposition of the dead, including visitation, religious rites, memorials and graveside services.
> >
> > (3) "Personal supervision" means immediate availability to continually coordinate, direct and inspect at first hand the practice of another.

(4) "Supervision" means regularly to coordinate, direct and inspect the practice of another.

19. Henke has been employed in the funeral service business in Janesville, Wisconsin, continually since 1968, and has been duly registered with DRL as an agent for burial agreements since June 29, 2004.

20. Henke is not a licensed funeral director or an apprentice funeral director, has never represented himself to be a licensed or apprentice funeral director, has neither engaged in embalming or preparing human bodies for burial or disposal except during a brief time when he [was] licensed to do so as a funeral apprentice, and has never directed or supervised the burial or disposal of human bodies.

21. Henke has extensive experience in those portions of the funeral service business other than embalming or preparing human bodies for burial or disposal and directing and supervising the burial or disposal of human bodies, and had distinguished himself as a skillful, sensitive, caring, honest businessman who has brought comfort to thousands of families in the Janesville area while working under the supervision of licensed funeral directors.

22. In providing services …, Henke has continuously provided truthful, honest, and accurate information to clients, although he does not hold a license as a funeral director or as an apprentice funeral director, and he has never met alone with clients …. in providing such information except at the express direction of a previous co-owner …, Dale Holzhuter …. Further, Henke has never provided such information except under the direct supervision of a licensed funeral director who was immediately available to continually coordinate, direct and inspect his practices.

….

26. On or about January 7, 2002, Holzhuter and his wife prepared a letter to the … Board using the false name of "Virginia Nickerman" and making false allegations concerning Henke and [Henke-Clarson]….

27. As a result of the false complaint filed by Holzhuter and his wife, [the board], through its investigator, Garrette, conducted an investigation which

included sending questionnaires to former costumers of [Henke-Clarson] who had not filed complaints.

28. As a result of information provided by Holzhuter and obtained through answers to two of said questionnaires, Garrette, on behalf of [the board], initiated an action against [Henke and Clarson], purporting to seek enforcement of the provisions of Section FD 2.03 of the Wisconsin Administrative Code, and alleging that Henke had violated said section by "meeting with families to gather obituary information, discuss[ing] funeral service information with pastors, setting the time of funeral services, and going over … monies to be advances for the family; including the terms of the contract of the goods and services statement, where the services would be held and if they were going to buy caskets or be cremated." ….

….

36. On August 7, 2007, [the board] issued a "Final Decision and Order" … ordering that Clarson's license as a funeral director be suspended for one year, beginning on October 6, 2007….

37. To the extent they may have engaged in or aided and abetted in providing the services which Henke is alleged to have engaged according to the allegations of [the board], [Henke and Clarson] have engaged in a form of speech which is protected by the First Amendment to the United States Constitution ….

38. But for the administrative regulations challenged herein, the speech in which the Plaintiffs are alleged to have engaged was not unlawful or misleading.

….

42. The interpretation of Sections FD 2.03 and FD 2.02 of the Wisconsin Administrative Code which has caused [the board] to pursue a claim that Henke is acting illegally by gathering obituary information, discussing funeral service information with pastors, setting the time for funeral services, and discussing the advancement of money and the terms of contracts for funeral services, and making funeral pre-arrangements, constitutes an attempt to regulate activity protected by the First Amendment to the United States Constitution ….

….

> 44. By their actions in creating Sections FD 2.03 and FD 2.02 of the Wisconsin Administrative Code, and in attempting to enforce such regulations so as to restrict the speech of the Plaintiffs, the Defendants have, under color of statutes and regulations of the State of Wisconsin, subjected or caused to be subjected the Plaintiffs to the deprivation of rights, privileges, and immunities secured by the United States Constitution, specifically the First Amendment ….
>
> **WHEREFORE**, the plaintiffs request judgment as follows:
>
> A. For their actual damages incurred as a result of the adoption and enforcement of the regulations against the Plaintiffs as described in this Complaint in an amount to be determined by the court.

¶14 The board argues that the complaint claims only that the board *attempted* to infringe on the free speech rights of Henke and Clarson, not that the board ever did so. Henke and Clarson do not respond to the board's legal argument that the claim must include a factual assertion that their speech was curtailed. Rather, Henke and Clarson argue that they have pled an actual violation of their right to free speech under the First Amendment rather than a mere attempted violation by alleging that the board pursued an administrative complaint against them which included sending questionnaires to their customers alerting them to the proceedings, and ordering Clarson's license suspended. We conclude that the allegations in their complaint do not state a cause of action under 42 U.S.C. § 1983, because there is no factual assertion that Henke and Clarson curtailed their speech in response to the board's actions.

¶15 "The first inquiry in any [42 U.S.C. §] 1983 suit is whether the plaintiff has been deprived of a right secured by the Constitution and laws of the

United States."[10] ***Reichenberger v. Pritchard***, 660 F.2d 280, 284-85 (7th Cir. 1981). Thus, in ***Reichenberger***, the Seventh Circuit denied a claim for damages under § 1983 based on allegations that the defendants attempted to suppress nude dancing at the plaintiffs' nightclubs when they "sought to participate in three separate municipal administrative proceedings relating to the plaintiffs' business, in an effort to have the plaintiffs' liquor licenses revoked, or to make the cost of renewal of the licenses prohibitively expensive," because there was no allegation "that the plaintiffs' expressive activity ha[d] been interrupted." ***Id.*** at 282, 285. Because the nude dancing continued at the nightclubs despite the defendants' efforts and the plaintiffs were never denied their liquor license renewals, there was no allegation of actual constitutional injury. ***Id.*** at 284-85. The court specifically rejected the plaintiffs' argument "that the threat of deprivation which the defendants' conduct generates is sufficient to give rise to a case or controversy meriting [§] 1983 intervention[,] …; [b]ecause the plaintiffs … failed to establish the presence of the threshold injury requirement." ***Id.*** at 286-87.

¶16 The Seventh Circuit reaffirmed the necessity of an actual constitutional injury for a 42 U.S.C. § 1983 action in ***Andree***. There, the owners of a resort were planning and promoting an outdoor music festival on their property, but did not seek a permit for the event as required by the Ashland County Ordinances. ***Andree***, 818 F.2d at 1307-08. The Ashland County sheriff consulted with the county attorney, and the attorney filed an action in Wisconsin circuit court to enjoin the planned music festival. ***Id.*** at 1308. The court denied

[10] Henke and Clarson argue that the board should not be allowed to escape liability for their unconstitutional conduct by arguing "no harm, no foul." But without "harm," in the form of a constitutional injury, there is no basis for an action under 42 U.S.C. § 1983. *See* ***Reichenberger v. Pritchard***, 660 F.2d 280, 284-85 (7th Cir. 1981).

injunctive relief. ***Id.*** Police officers then attended the concert over the owners' objections, to observe the crowd and to check for liquor law violations. ***Id.*** at 1308-09. The owners sued in federal court under 42 U.S.C. § 1983, claiming "that the ordinance, the injunction suit, and the actions of the deputies violated [their] First Amendment rights." ***Id.*** at 1310. They argued that "as a result of the unfavorable publicity generated by the attempt to secure the injunction, the crowd that attended the festival was only 100 to 350 rather than the expected 2000 to 4000." ***Id.*** at 1309-10.

¶17 The Seventh Circuit affirmed the district court order granting summary judgment to the defendants, concluding that the action for an injunction in state court did not constitute a deprivation of the owners' First Amendment rights. ***Id.*** at 1310. It explained that "the mere *attempt* to deprive a person of his [or her] First Amendment rights is not, under usual circumstances, actionable under [42 U.S.C. §] 1983." ***Id.*** at 1311. The court rejected the owners' argument that "they suffered a concrete injury from the County's attempts to enforce its ordinance" because "[t]here [was] no competent evidence from which a reasonable inference may be drawn that the County's injunction suit resulted in reduced attendance at the concert."[11] ***Id.*** at 1312. Thus, the court held that "the mere unsuccessful attempt to secure an injunction under an allegedly unconstitutional ordinance does not itself make out a deprivation of constitutional rights." ***Id.***

[11] Henke and Clarson distinguish ***Andree***, arguing that the constitutional injury here was "reduced attendance" at their funeral home. Even assuming that this alone would satisfy the requirement for a showing of constitutional injury, there are no facts in the complaint from which we can infer that the actions of the board reduced business at the funeral home. Even if we overlooked this deficiency in the complaint, Henke and Clarson have not identified any evidence supporting this claim in the summary judgment record, beyond Clarson's affidavit stating that their business declined in years corresponding with the board investigation. As in ***Andree***, this is insufficient.

¶18 Therefore, the threshold inquiry for whether Henke and Clarson are entitled to damages under 42 U.S.C. § 1983 is whether they have pled that their speech was actually curtailed because of the board's actions. Even reading the complaint in the light most favorable to Henke and Clarson, as we must, the only actual damage we can infer from the complaint is that the board caused damage to their professional reputations through communicating to their costumers that Henke and Clarson had violated the administrative rules. Nowhere in the complaint do Henke and Clarson allege that they ceased their activities as a result of the board's action or that the board's action interfered with their ability to continue their activities, and they specifically state that the board ordered Clarson's license suspended at a future date. While a claim that the board's action damaged their reputations may support a claim for defamation, it does not support a claim for damages for infringement of free speech rights under 42 U.S.C. § 1983.[12] Thus, we conclude that the board is entitled to summary judgment on the claim for damages under 42 U.S.C. § 1983.

Declaratory and Injunctive Relief

[12] Henke and Clarson argue that the fact that the allegations in their complaint would support a defamation claim does not defeat their claim for constitutional violation under 42 U.S.C. § 1983. While we agree with this general proposition, it misses the point. We do not conclude that the constitutional claim fails because Henke and Clarson have stated a defamation claim. Rather, we conclude that the allegations in the complaint, while possibly stating a claim for defamation, do not state a claim under 42 U.S.C. § 1983 because Henke and Clarson assert only a damage to their reputation, not that there has been any infringement on their right to free speech. *See* ***Albright v. Oliver***, 975 F.2d 343, 346-47 (7th Cir. 1992) (explaining that "in the garden-variety public-officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest," although "[d]efamation accompanying a discharge from employment can make it impossible for a person to obtain equivalent employment elsewhere, thus depriving him of liberty of occupation, one of the liberties protected by the due process clause").

¶19 Next, we turn to the parties' dispute over whether Henke and Clarson are entitled to a declaratory judgment that the disputed administrative rules are unconstitutional either facially or as applied in this case, and whether injunctive relief is warranted. We begin with an analysis of whether the rules are *facially* unconstitutional.

¶20 WISCONSIN ADMIN. CODE § 2.03(1) prohibits individuals who are not licensed funeral directors from making "funeral arrangements," and WIS. ADMIN. CODE § 2.02(1) defines "funeral arrangements" as "the provision of information or advice on selection and cost of merchandise, facilities, equipment or personal services provided for final disposition of a dead human body in the course of formulating a contractual agreement between a funeral director or funeral home and client." Thus, the rules regulate commercial speech, which "is protected from unwarranted governmental regulation via the [F]irst and [F]ourteenth [A]mendments" to the United States Constitution. *See* ***City of Milwaukee v. Blondis***, 157 Wis. 2d 730, 735, 460 N.W.2d 815 (Ct. App. 1990) (defining constitutionally protected "commercial speech" as "speech that proposes a commercial transaction."). A governmental restriction of commercial speech is subject to the following constitutional test:

> (1) if the speech is "commercial," i.e. essentially proposes no more than a commercial transaction, the speech must not be misleading and must concern a lawful activity;
>
> (2) the government must have a "substantial" governmental interest to sustain any restriction;
>
> (3) the regulation of commercial speech which is adopted must "directly advance" that "substantial interest"; and
>
> (4) the restriction must not be more extensive than necessary.

Id. (citation omitted). Additionally, while "[n]ormally, the person attacking the constitutional validity of a statute has the burden of proving unconstitutionality beyond a reasonable doubt …. in [F]irst [A]mendment economic free speech cases, when the speech is not false or deceptive and does not concern unlawful activities, the burden is on the government." ***Id.*** at 734 (citation omitted).

¶21 The board contends that the rules are not facially unconstitutional because they can be given a narrowing construction that adheres to First Amendment principles. *See* ***State ex rel. Harvey v. Morgan***, 30 Wis. 2d 1, 13, 139 N.W.2d 585 (1966) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." (citation omitted)). The board argues that the rules can be interpreted as prohibiting only "the provision of information or advice specifically with respect to the disposition of a dead human body, and only in the context of forming a contract for such." Under this construction, asserts the board, "[a]ctivity such as gathering obituary information, discussing funeral services, etc., would not be restricted." The board argues that we are required to reverse the trial court's order declaring the rules unconstitutional because the rules are subject to a constitutional interpretation, and therefore must be upheld. *See* ***id.*** Specifically, the board asserts that

> [t]he state has a substantial government interest in protecting the public during a particularly vulnerable time—at the time of death of a loved one. The state's licensure requirements for a funeral director are properly tailored to safeguard the public and are a significant tool in protecting the public by ensuring that individuals who make funeral arrangements are skilled in burial or other disposition of dead human bodies, anatomy, and embalming, and will properly advise clients regarding the disposition of the body of their loved one.

¶22 Henke and Clarson respond that the rules are facially unconstitutional because they define "funeral arrangements" as "the provision of information or advice" related to funerals, and then prohibit individuals who are not licensed funeral directors from participating in this conduct. Henke and Clarson assert that the board did not meet its burden of showing this restriction on commercial speech is constitutional, and thus the trial court properly declared the regulations invalid.

¶23 We conclude that the parties have not sufficiently developed their arguments on appeal as to what they believe the rules do and do not prohibit to allow us to meaningfully assess the facial constitutionality of the rules. That is, we cannot glean what exactly Henke and Clarson believe the language of the rules unconstitutionally prohibits, nor can we glean what the board believes the rules specifically allow. We decline to develop these arguments for the parties. Because we have no basis to conclude that the regulations are facially unconstitutional, we cannot uphold the trial court's order holding those provisions facially invalid.[13] We now turn our attention to the parties' dispute over whether the rules are unconstitutional as applied.

¶24 The board argues that any argument by Henke and Clarson that the rules are unconstitutional as applied to them is moot because the board has now stipulated that their conduct, as alleged in the administrative proceedings, did not

[13] The trial court found that the regulations are facially unconstitutional because the language of the regulations goes beyond the enabling statute. *See* WIS. STAT. § 445.03(2) (authorizing the board to "[m]ake and enforce rules not inconsistent with this chapter establishing professional and business ethics for the profession of funeral directors and for the general conduct of the business of funeral directing, and for the examination and licensing of funeral directors and the registration of apprentices"). This reasoning does not address the constitutionality of the rules.

violate the rules.[14] Thus, the board contends, they are no longer seeking to apply the rules in the way that Henke and Clarson allege is unconstitutional, rendering moot their action for a declaration that the rules are unconstitutional as applied in this case. Henke and Clarson respond that their demand for a declaratory judgment that the rules are unconstitutional as applied is not moot because the board stipulated only to dismissal of their administrative proceedings against Henke and Clarson, but did not stipulate that they had applied the rules in an unconstitutional way or that they would not attempt to apply them again in the same way in the future. They argue that the board's attempt to apply the rules to them was an unconstitutional restriction on their commercial and private speech.

¶25 We conclude, again, that the parties' appellate arguments are insufficient for us to determine whether the board's attempt to apply the

[14] The trial court said:

> The defendants in this case have made no showing or even advanced a colorable argument that their attempts to ban the speech at issue here is in any way related to a particular threat to consumers or that there is any other compelling interest in restricting the plaintiff's commercial speech. On the contrary, after extensive discovery in this case, the defendants are unable [to] advance any facts that would support such an attempt.
>
> As importantly, the defendants here have made no showing that the regulations under which they purport to operate are constructed in as narrow a fashion as possible to advance a compelling state interest without impinging on constitutional guarantees. On the contrary, some of what they propose to do sweeps up non-commercial speech with the same broom as the commercial speech. While one may conclude that information regarding the price of a casket is commercial speech, it is hard to argue that talking to the pastor of the church about arranging for a soloist or getting information for an obituary from the bereaved involves commercial speech. What the Board attempts to do here not only unjustifiably bans commercial speech but also attempts to muzzle non-commercial speech.

regulations in this case was unconstitutional. Henke and Clarson point to the disciplinary proceedings leading to this action, where the board attempted to restrict Henke from discussing with customers "the types of pre-need funeral services they wanted, including where the funeral services would be held and if they were going to buy a casket or be cremated"; "advis[ing] [customers] in regard to the options for the funeral service[s] and the costs of the options"; "gather[ing] … obituary information, meet[ing] with pastors, set[ting] time of the funeral services and go[ing] over monies to be advanced for the family"; and "preparing obituaries."[15] Henke and Clarson argue that the board's attempt to regulate their speech is analogous to the administrative action held unconstitutional in ***Walker v. Flitton***, 364 F.Supp.2d 503, 526-27 (M.D. Penn. 2005) (declaring funeral board's regulations unconstitutional on First Amendment grounds because they prohibited the protected activity of "an individual who is … an employee or agent of a particular funeral director [to] interact with consumers, disseminate accurate price information, and solicit those individuals for the purpose of having their employer sell preneed funeral services and plans on behalf of a licensed funeral director").[16]

¶26 The problem is that we do not know if the board attempted to restrain Henke from engaging in the types of activities the funeral board prohibited

[15] The parties' citations to the record on summary judgment do not clarify these allegations. We note that Henke and Clarson have submitted portions of the transcript of the hearing before the ALJ, but these portions of the transcripts do not tell us what exactly Henke was doing or which actions, exactly, the board attempted to prohibit in its application of its rules.

[16] The board does not argue that its application of the rules to Henke and Clarson in this case was constitutional, only that the issue is now moot. Although the board has essentially conceded that their attempt to apply the rules to Henke and Clarson was unconstitutional, we are not bound by this concession. *See* ***Lloyd Frank Logging v. Healy***, 2007 WI App 249, ¶15 n.5, 306 Wis. 2d 385, 742 N.W.2d 337 (we are not bound by a party's concession of law); ***State v. Cole***, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328 (the constitutionality of a statute is a question of law).

in ***Walker***. Henke and Clarson defended against the board's disciplinary action by arguing that they did not do anything in violation of the rules, and there was then an extensive hearing before the ALJ on disputed issues of both fact and law. Ultimately, the board dismissed its action against Henke and Clarson, conceding that none of their actions violated the regulations. In their complaint, Henke and Clarson do not set forth what actions Henke has engaged in, and claim that "[t]o the extent [Henke] may have engaged in … providing the services which Henke is alleged to have engaged according to the allegations of [the board], [Henke has] engaged in a form of speech which is protected by the First Amendment to the United States Constitution." On this record, we do not know exactly what Henke claims he was doing that the board attempted to prohibit, and we therefore cannot conclude that the rules were unconstitutionally applied.

¶27 Finally, the board argues that the trial court erred in withholding a decision as to whether to grant injunctive relief pending trial, because the parties have already resolved their dispute over whether the board's application of the rules to Henke and Clarson was improper, and thus there is no justiciable controversy between the parties to resolve. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982). It also asserts that this issue has no likelihood of repetition that would necessitate addressing it. *See* ***G.S. v. State***, 118 Wis. 2d 803, 805, 348 N.W.2d 181 (1984).

¶28 For the same reason that we have decided that we have no basis to conclude that the rules have been unconstitutionally applied to Henke and Clarson, we conclude that we have no basis to conclude that they are entitled to injunctive relief. Accordingly, we reverse and remand for the trial court to issue an order granting summary judgment to the board on the issue of the claim for damages

under 42 U.S.C. § 1983. We also reverse the court's summary judgment declaring the rules unconstitutional.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.